Supreme Court, U.S.
FILED
MAR 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-834

In the Supreme Court of the United States

OCTOBER TERM, 1985

H. G. NIXON, ADMINISTRATOR OF THE ESTATE OF LILLIAN T. NIXON, PETITIONER

v.

MARGARET M. HECKLER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

12 pp

TABLE OF AUTHORITIES

Page

Cases:

Bivens v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 3

Brandon v. *Holt*, No. 83-1622 (Jan. 21, 1985) 4

Bush v. *Lucas*, 462 U.S. 367 7

Butz v. *Economou*, 438 U.S. 478 9

Ellis v. *Blum*, 643 F.2d 68 ..... 4, 8, 9

Heckler v. *Day*, No. 82-1371 (May 22, 1984) 7

Heckler v. *Ringer*, 466 U.S. 602 ..... 8, 9

Mathews v. *Eldridge*, 424 U.S. 319 ..... 5, 7

United States v. *Hopkins*, 427 U.S. 123 4

Weinberger v. *Salfi*, 422 U.S. 749 8

Constitution, statutes and regulation:

U.S. Const. Amend. V (Due Process Clause) 4, 8

Social Security Act, Title II, 42 U.S. 401 *et seq.* :

42 U.S.C. 405(g) 7

42 U.S.C. 405(h) 4, 7, 8, 9

28 U.S.C. 1331 ..... 3, 4, 7, 8, 9

20 C.F.R. 404.1518 8

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-834

H. G. NIXON, ADMINISTRATOR OF THE ESTATE OF LILLIAN T. NIXON, PETITIONER

v.

MARGARET M. HECKLER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner, as administrator of the estate of his wife, brought this personal damages action against respondent, the former Secretary of Health and Human Services, claiming that his wife's due process rights were violated in connection with her receipt of a notice that her Social Security disability benefits would be terminated. Petitioner contends that the courts below erred in dismissing the suit.

1. a. As part of a review of disability cases in August 1981, the Alabama Department of Education, Disability Determination Division, asked petitioner's wife (Mrs. Nixon) to provide medical evidence of her continuing disability. Mrs. Nixon responded by filing a Social Security Disabled Person Report, which was received by the state

agency on August 25, 1981. Mem. Exh. A.[1] A consulting physician examined Mrs. Nixon on behalf of the state agency and expressed the view that she was disabled (Mem. Exh. B; Pet. 13), and other medical reports also were submitted (Mem. Exh. C). Two additional examinations were scheduled in October 1981—one with a second consulting physician and another with a hospital (Mem. Exh. D)—but Mrs. Nixon failed to appear for either (Mem. Exh. E; Pet. 13). By letter dated November 16, 1981, the state agency informed Mrs. Nixon that the record indicated that she was able to work and that the evidence in the file was "not sufficient to determine the current severity of your impairments" (Supp. Mem. Exh. 1). The state agency therefore informed Mrs. Nixon that her disability benefits would be terminated unless she submitted additional evidence within 10 days (*ibid.*). Mrs. Nixon did not submit any additional information (Supp. Mem. Exhs. 1, 2).

On December 2, 1981, the state agency recommended that the Social Security Administration (SSA) terminate Mrs. Nixon's benefits (Mem. Exh. E). The recommendation stated (*ibid.*):

> Considering all evidence of record, medical documentation is not sufficient to determine the current severity of the claimant's impairments. Therefore it is recommended that disability benefits be ceased since the claimant failed to report to consultative examinations. Due process has been accomplished.

---

[1] "Mem." refers to the memorandum in support of defendant's motion to dismiss or, in the alternative, motion for summary judgment, filed in the district court on August 5, 1984. "Supp. Mem." refers to the supplemental memorandum brief in support of the United States' motion for summary judgment and/or motion to dismiss, filed in the district court on October 9, 1984. We have lodged a copy of these memoranda (and exhibits thereto) with the Clerk of this Court.

Based on the state agency's recommendation, SSA sent a notice to Mrs. Nixon dated January 8, 1982. The notice explained that her benefits would be terminated as of the end of December 1981 because "[t]he medical evidence in your case shows that you became able to do substantial gainful work in October 1981" (Pet. App. A13). The notice also informed Mrs. Nixon that she could request reconsideration of the initial determination within 60 days (*id.* at A16). Mrs. Nixon requested reconsideration on January 25, 1982 (Mem. Exh. G).

Mrs. Nixon died on February 19, 1982 (Pet. App. A21). Thereafter, in its reconsideration decision dated March 3, 1982, SSA concluded that Mrs. Nixon had been disabled up to the date of her death (*ibid.*). The supporting rationale prepared by the state agency explained that the prior termination of benefits "was based on insufficient evidence based on failure to appear for a consultative examination" (*ibid.*; Mem. Exh. I, at 2).

b. Petitioner then brought this *Bivens*[2] suit against respondent, who then was the Secretary of Health and Human Services, in the United States District Court for the Southern District of Alabama. Invoking the district court's jurisdiction under 28 U.S.C. 1331, petitioner sought damages for an alleged due process violation in connection with the termination of Mrs. Nixon's benefits (Complaint 4; Pet. 16-17; Pet. App. A6-A12). Petitioner contended that the termination notice was inaccurate because it did not state that Mrs. Nixon's benefits would be terminated as a result of her failure to appear at the consultative examinations and that the termination notice caused emotional distress,

---

[2] *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971).

which contributed to her death.[3] The district court, adopting the magistrate's recommendation, held that the exclusive review provisions of 42 U.S.C. 405(h) with respect to claims arising under the Social Security Act deprived the district court of jurisdiction over this suit under 28 U.S.C. 1331 (Pet. App. A2-A4). The court of appeals affirmed without opinion (*id.* at A1).

2. The court of appeals correctly affirmed the dismissal of this suit. Petitioner's claim for damages against former Secretary Heckler is frivolous, and the court of appeals' unpublished judgment order presents no issue warranting review by this Court.

a. Petitioner's claim for damages against former Secretary Heckler is frivolous.[4] As an initial matter, although petitioner seeks damages against former Secretary Heckler in her personal capacity, he has not identified any personal involvement by her in the drafting of the particular notice that was sent to his wife. Indeed, petitioner expressly recognizes that respondent "might in fact not be the proper defendant in this case" (Pet. 17 n.3). It is clear that in the absence of any personal involvement, respondent may not be held liable in damages for a constitutional tort. See *Brandon* v. *Holt*, No. 83-1622 (Jan. 21, 1985), slip op. 6-7; *Ellis* v. *Blum*, 643 F.2d 68, 85 (2d Cir. 1981). Thus, even assuming that a due process violation occurred, there would

---

[3]See Br. in Opp. to Gov't Mots. to Dis. or for Summary Judgment 6, 13, 15-16, 17-18. Petitioner also sought to recover damages from the United States under the Federal Tort Claims Act, but he has abandoned that claim. See Pet. 17-18 & n.3.

[4]To the extent that the complaint can be read to state a claim against the United States, such a suit is barred because Congress has not waived the sovereign immunity of the United States to suits for damages based on an alleged violation of the Due Process Clause. *United States* v. *Hopkins*, 427 U.S. 123, 130 (1976).

be no basis for the recovery of damages against respondent. She accordingly should not be subjected to the burden of any further proceedings in this case.

Moreover, petitioner's due process claim is wholly unsubstantial. His argument is premised entirely on the notion that Mrs. Nixon should have been specifically notified that her benefits would be terminated because she failed to appear for the two scheduled consultative examinations. If Mrs. Nixon had been so notified, petitioner contends, she would have been afforded the opportunity at the reconsideration stage to explain her absence; instead, she submitted additional evidence of disability at the reconsideration stage. See Pet. 22-23. There are numerous flaws in this contention:

First, contrary to petitioner's assertion (Pet. 21-23), the state agency's recommendation to SSA that Mrs. Nixon's benefits should be terminated was not based solely on her failure to report for the consultative examinations. The state agency relied on the fact that this failure in turn left the agency with insufficient evidence on which to find her disabled. See Mem. Exh. E; Pet. App. A22, quoted at page 2, *supra*. Because Mrs. Nixon bore the burden of establishing her continuing eligibility (*Mathews* v. *Eldridge*, 424 U.S. 319, 336 (1976)), this defect required the state agency to find that she was able to engage in substantial gainful activity. That is exactly what the January 8, 1982 termination notice stated. There accordingly was no inaccuracy in the termination notice and thus no predicate for a due process claim.

Second, Mrs. Nixon in fact had been given ample warning prior to her receipt of the January 8, 1982 notice that her benefits would be terminated. The purpose of the consultative examinations Mrs. Nixon failed to attend was to cure the deficiencies in the record. See Pet. App. A22. After

Mrs. Nixon failed to appear, the state agency informed her that the evidence then in the file indicated that she could work, that there was insufficient evidence to determine the severity of her impairments, and that she had 10 days within which to furnish additional information. See page 2, *supra*. Thus, Mrs. Nixon was fully notified that her claim would be denied because of insufficient evidence, and her benefits were terminated only after she failed to respond.

Third, after Mrs. Nixon received the termination notice, she requested reconsideration of that decision. As petitioner concedes (Pet. 22-23), additional evidence of her disability was submitted at the reconsideration stage, and benefits then were continued to the date of her death. Thus, any deficiency in the state agency's initial decision did not prevent Mrs. Nixon from receiving actual notice of the termination and of her right to further review. Nor did it prevent her from then seeking further review. The notice therefore had no lasting impact on the processing of her claim.

Fourth, petitioner erroneously relies (Pet. 22) on a regulation that provides that an individual's benefits may be terminated if he fails to attend a scheduled consultative examination. That regulation states that if a claimant has a "good reason" for missing the examination, he should tell SSA or the state agency as soon as possible. 20 C.F.R. 404.1518. Petitioner argues that the termination notice should have mentioned his wife's failure to appear at the scheduled consultative examinations so that she could have attempted to establish a "good reason" for that failure when she sought reconsideration of the initial denial of her claim. However, the regulation upon which petitioner relies makes clear that a claimant should inform SSA or the state agency of his inability to appear *before* the scheduled date of the examination. It does not contemplate that the claimant may simply fail to appear and then offer an explanation only

later if his claim is subsequently denied, as petitioner maintains.

b. Petitioner does not in any event have a cause of action for damages in the present circumstances. An individual whose claim for disability benefits is denied at the initial stage of the administrative review process has a right to seek reconsideration, an ALJ hearing, and Appeals Council review. He then has a right under 42 U.S.C. 405(g) to judicial review of the Secretary's final decision on his claim. These special statutory procedures have been finely tuned by Congress to accommodate the interests of claimants (*Heckler* v. *Day*, No. 82-1371 (May 22, 1984), slip op. 8-14), and, as this Court has recognized, they provide a fully adequate remedy for the vindication of constitutional claims and the recovery of benefits due. See, *e.g.*, *Mathews* v. *Eldridge*, 424 U.S. 319 (1976). The existence of these elaborate procedures, as well as the potential consequences of private damages actions arising under an administrative program in which more than two million claims are processed annually, counsel strongly against judicial implication of a damages remedy in this setting. Compare *Bush* v. *Lucas*, 462 U.S. 367 (1983).

In addition, under 42 U.S.C. 405(h), the judicial review provision in 42 U.S.C. 405(g) is exclusive, and "[n]o action against the United States, the Secretary, or any officer or employee thereof shall be brought under sections 1331 or 1346 of title 28 to recover on any claim arising under this subchapter." Because petitioner invoked the district court's jurisdiction under 28 U.S.C. 1331, Section 405(h) reinforces the conclusion that petitioner has no cause of action against respondent.

Petitioner argues (Pet. 28-34) that this suit is not barred by Section 405(h) because he does not seek an actual award of Social Security benefits and because this suit arises under

the Due Process Clause, not the Social Security Act. Contrary to petitioner's contention, however, the jurisdictional preclusion in Section 405(h) cannot be avoided simply because the plaintiff casts his allegations in constitutional terms. See *Weinberger* v. *Salfi*, 422 U.S. 749, 760-761 (1975). The Court recently adhered to this view in *Heckler* v. *Ringer*, 466 U.S. 602 (1984), holding that a constitutional challenge to the procedures utilized in the adjudication of claims "arises under" the Social Security Act for purposes of Section 405(h), even where the plaintiff does not seek an actual award of benefits. See 466 U.S. at 610 & n.7, 614-616.

Petitioner relies (Pet. 34-35) on *Ellis* v. *Blum*, 643 F.2d 68, 76 (1981), in which the Second Circuit concluded that Section 405(h) would not bar an action against state officials under 28 U.S.C. 1331 to recover damages for an alleged due process violation in the initial adjudication of disability claims under the Social Security Act. See also 643 F.2d at 85. However, the court in *Ellis* v. *Blum* admitted to considerable uncertainty regarding the applicable jurisdictional principles under the Social Security Act (643 F.2d at 73-75). Moreover, *Ellis* v. *Blum* was decided prior to *Ringer*, in which this Court rejected the notion that attaching a "procedural" or "constitutional" label to a legal issue renders the jurisdictional bar in Section 405(h) inapplicable.[5] Because intervening events have undermined the premises of *Ellis* v. *Blum* and because the unpublished judgment order of the court of appeals in the instant case does not even address the preclusion issue,[6] there is no clear circuit

---

[5]Indeed, the separate opinion in *Ringer* quoted *Ellis* v. *Blum* for the proposition that Section 405(h) does not bar the exercise of federal question jurisdiction in a case raising only a "procedural" challenge. See 466 U.S. at 636-637 (opinion of Stevens, J.). As we have explained in the text, the majority in *Ringer* rejected that distinction.

[6]The brief of the appellee filed on behalf of respondent in the court of appeals argued in the alternative that there was no due process violation. See Appellee Br. 8-9.

conflict requiring resolution by this Court. Furthermore, the question whether a personal damages claim can be brought against the Secretary under 28 U.S.C. 1331, notwithstanding the preclusion of review in Section 405(h), does not appear to have arisen in any other appellate decision since *Ellis* v. *Blum* and *Ringer* were decided; it therefore is not of sufficient independent importance to warrant review by this Court.

Finally, as we have explained, this case does not present an appropriate occasion for the Court to consider the preclusion question, in light of the wholly frivolous nature of the underlying damages claim against former Secretary Heckler. If this Court is to fulfill the promise of *Butz* v. *Economou*, 438 U.S. 478, 507-508 (1978), that "[i]nsubstantial [*Bivens*] lawsuits can be quickly terminated" so that "federal officials are not harassed by frivolous lawsuits," this litigation should be put to an end.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

MARCH 1986

DOJ-1986-03